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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 293

JUNIUS IRVING SCALES,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

TELFORD TAYLOR
Counsel for Petitioner
400 Madison Avenue
New York 17, N. Y.

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OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit (R. 116-33) is reported at 227 F. 2d 581.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1955, and a petition for rehearing was denied on November 17, 1955. By order of Chief Justice Warren, the time for filing a petition for certiorari was extended to January 6, 1956, and by subsequent order of Mr. Justice Clark the time for such filing was extended to and including January 16, 1956. The petition was granted on March 26, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Court of Appeals for the Fourth Circuit affirmed a judgment of the District Court of the United States for the Middle District of North Carolina, entered upon a jury verdict under an indictment, finding the petitioner guilty under the so-called "membership clause" of the Smith Act (Act of June 28, 1940, 18 U. S. C. 2385), proscribing membership in any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of the Government of the United States by force or violence, with knowledge that the purposes of the group of persons are such. It is not disputed that the petitioner was a member of the Communist Party during the three-year period prior to the indictment. The questions are:

1. Whether the "membership clause" of the Smith Act is unconstitutional on its face, or as applied to the facts of this case;

2. Whether the indictment charges an offense under the laws of the United States, in view of Section 4(f) of the Internal Security Act of 1950 (50 U. S. C. 783(f), which provides that neither the holding of office nor membership in any Communist organization shall constitute *per se* a violation of that or any other criminal statute;

3. Whether the evidence was sufficient to support the judgment of conviction under the Smith Act; and

4. Whether petitioner was denied a fair trial by virtue of (a) the method of empanelling the Grand Jury, (b) the admission of evidence offered by the prosecution, over the defendant's objection that the evidence was incompetent, irrelevant and inflammatory, (c) the denial of petitioner's request to examine written statements furnished to the Federal Bureau of Investi-

gation by prosecution witnesses, or (d) the "Congressional findings" about the Communist Party in the Internal Security Act of 1950 (50 U. S. C. 781) and the Communist Control Act of 1954 (50 U. S. C. 841).

STATUTES INVOLVED

The relevant provisions of the Constitution of the United States, the Smith Act, the Internal Security Act of 1950, the Communist Control Act of 1954, and the federal statutes governing the qualifications and empanelling of jurors (28 U. S. C. 1861 and 1864) are set forth in the Appendix, *infra*, pp. 47-52.

STATEMENT

The petitioner has not been accused or convicted of helping to organize the Communist Party, of participating in its activities, or of advocating the overthrow of the United States Government by force or violence. He has not been accused or convicted of conspiring for such purposes, or of participating in a conspiracy of any kind. He has not been accused or convicted of any *act* whatever, other than being (or, more accurately, not ceasing to be) a member of the Communist Party.

The indictment (R. 1-2),[1] returned on November 18, 1954, charges that the Communist Party is and has since January 1946 been a group of persons who advocate overthrowing the United States Government by force and violence; that Junius Irving Scales is and has since January 1946 been a member of the Communist Party; that Scales knew the Party to be a group of persons who advocate violent overthrow; and that Scales intended "to bring about

[1]References to the pages of the printed transcript of record are cited herein as "R.", and to unprinted portions of the original trial record as "Tr."

such overthrow by force and violence as speedily as circumstances would permit."

The trial opened April 11 and ended April 22, 1955. It was conceded by the prosecution (and the trial judge so charged, R. 108) that Scales' criminal act had to be committed between November 18, 1951 and November 18, 1954, the three-year limitations period preceding the indictment. It was acknowledged by Scales (and the trial judge so informed the jury, R. 111) that he was a member of the Communist Party within the statutory period.[2]

The prosecution called three witnesses. The first was Lautner, a paid consultant for the Department of Justice and formerly a Communist. He had never met or had any contact with Scales, and had left the Communist Party in 1950, nearly two years before the limitations period. His testimony (R. 12-31) was limited to the identification of various publications used in Communist circles and to the expression of his opinion, based on these documents and his personal experience while a Communist, that the Party advocated the destruction of the Government by force and violence (R. 24-31).

The second witness, Clontz, by pre-arrangement with the Federal Bureau of Investigation, made contact with Scales in North Carolina in 1948 and joined the Communist Party there in 1950 (R. 31-32 and 43). He went to New York City in March 1951, and all but one item[3] of his testimony relates to occurrences prior to the statutory period. His conversations with Scales before joining the Party are heavily relied on by the Government, to show Scales' knowledge of the Party's aims (R. 35-43). The court below, in

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[2]Petitioner is publicly known as Chairman of the Communist Party in North Carolina.

[3]Clontz testified to a communication with Scales in December of 1951 (R. 56).

ruling that there was sufficient evidence to support the conclusion that Scales knew that the Party advocated violent overthrow, relied principally[4] (apart from Scales' membership and official position in the Party) on two conversations between Scales and Clontz in 1948 and early 1950, over four years before the indictment was brought.

The third Government witness, Childs, likewise joined the Party as an observer for the Federal Bureau of Investigation. He testified extensively concerning his conversations with Scales and his attendance at a Party "school" in 1952 (R. 65-96). But he did not testify that Scales intended to overthrow the Government by force, that Scales knew the aims of the Party to be such, or that in fact they were such.

The petitioner did not testify. For the defense, six witnesses were called, including three character witnesses.[5] Scales' mother testified to conversations in which he had denied any belief or knowledge that the Party advocates violent overthrow (R. 100-04). A member of the faculty of Wesleyan University[6] testified on the nature of Marxism and Leninism, and expressed the opinion that, since 1935, the Communist Party has recognized the possibility of achieving majority political power by means of elections (R. 97-100). *Cf. United States* v. *Mesarosh*, 223 F. 2d 449, 459-66 (dissenting opinion of Judges Hastie and Maris).

The jury found Scales guilty, and the Trial Court sentenced him to be imprisoned for a term of six years (R.

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[4]R. 127-30.

[5]These comprised two members of the faculty of the University of North Carolina, and a clergyman from Chapel Hill. A fourth witness, Professor Douglas Maggs of the Duke University Law School, at which Clontz studied, contradicted Clontz' testimony concerning an alleged conversation between them with respect to Scales' legal defense (Tr. 1361-74).

[6]Professor Robert S. Cohen, a teacher of physics and philosophy, who gives courses entitled "Philosophy of American Democracy" and "Philosophy of Marxism".

116).[7] Thereafter, Scales appealed to the Court of Appeals for the Fourth Circuit, on the same general grounds that are the basis of this petition.

The Court of Appeals sustained the constitutionality of the "membership clause" of the Smith Act[8] on the ground that the clause "is, of course, nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence"[9] (R. 123). This conclusion is the more remarkable in that the statutory provision in question makes no reference to conspiracy, and this is equally true of the indictment under which Scales was tried (R. 1-2). No co-conspirators are mentioned in the indictment, nor is any overt act in furtherance of conspiracy charged.[10]

The court below also rejected Scales' contention that his prosecution under the "membership clause" of the Smith Act is barred by Section 4(f) of the Internal Security Act of 1950, which provides that neither membership nor office-

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[7]Inasmuch as the maximum penalty for a conviction of conspiracy to violate the Smith Act was five years, Scales' sentence was greater than has been imposed on any one else under the Smith Act. After the sentencing, Scales was held without bail, which had been fixed at $100,000 at the time of his arrest and subsequently reduced to $35,000 in cash (Tr. 1573-79). The order denying bail pending appeal was affirmed by a judge of the Court of Appeals for the Fourth Circuit, but on May 12, 1955, Chief Justice Warren reinstated the previous bail.

[8]The Court of Appeals for the Fourth Circuit had already, by way of dictum, sustained the constitutionality of the "membership clause" in *Frankfeld* v. *United States*, 198 F. 2d 679, at 684 and 690. That case involved an indictment under the conspiracy statute and the other provisions of the Smith Act relating to organization and advocacy.

[9]In fact, the Smith Act does not cover conspiracy to overthrow the Government (which is prohibited by an old statute dating from the War Between the States, now 18 U. S. C. 2384), but rather, advocacy, organization of groups, and distribution of literature with the object of overthrowing the Government.

[10]On petition for rehearing, Scales pointed out that, under the theory of the Court of Appeals, he had been convicted of a crime for which he had been neither indicted nor tried.

holding in the Communist Party shall constitute "per se" a violation of that section "or of any other criminal statute". Totally ignoring the logic and legislative history that require the application of Section 4(f) to just such a proceeding as the present one, the Court of Appeals undertook to distinguish "mere membership" from "membership with knowledge" (R. 126). Under this decision, the application of Section 4(f) would be restricted to Communist Party members who can prove that they do *not* know the Party as a group that advocates violent overthrow. Since such membership is outside any criminal statutory proscription, Section 4(f) is thus rendered meaningless surplusage.

The Court of Appeals found no merit in Scales' other contentions, based upon the insufficiency of the evidence and errors committed in the course of his indictment and trial. It affirmed the judgment of conviction on November 7, 1955, and a petition for rehearing was denied without further opinion ten days later (R. 134). This Court granted certiorari on March 26, 1956.

SUMMARY OF ARGUMENT

I. *The Membership Clause of the Smith Act is Unconstitutional under the First and Fifth Amendments to the Constitution.* In *Dennis* v. *United States*, 341 U. S. 494, this Court construed other provisions of the Smith Act as requiring proof of specific intent to overthrow the Government by force and violence, and set forth several elements of proof, including such specific intent, that are essential to the constitutionally valid application of the Act. The clause of the Smith Act now before the Court does not in terms require proof of intent, and is not reasonably susceptible to such a construction. The conspiracy charged in the *Dennis* case was there held (at p. 511) to be the source of such danger to the Government as to escape the bar of the First

Amendment. In the instant case no conspiracy was charged or proved. Neither are the other constitutionally essential elements specified in the *Dennis* case (at p. 516) present here, for defendant was not charged with any Communist Party "activities" whatsoever, or with having any individual "power to bring about the evil" of violent overthrow, or with intending to use language calculated to incite other persons to such action.

Both on its face and as applied in this case, the membership clause is wholly insufficient to satisfy the "clear and present danger" test as restated in the *Dennis* case, and is therefore unconstitutional under the First Amendment. See also *Herndon* v. *Lowry*, 301 U. S. 242, 261; *Whitney* v. *California*, 247 U. S. 357, 379; *DeJonge* v. *Oregon*, 299 U. S. 353, 362-66. Furthermore, the attempt to attach criminal consequences to non-conspiratorial "membership", unaccompanied by any acts or declarations whatsoever, imputes to the defendant the assumed guilt of others, and violates the due process clause of the Fifth Amendment. *Cf. Whitney* v. *California*, 274 U. S. 357, 372-73.

II. *The Indictment Fails to State an Offense under the Laws of the United States.* Prosecution of Communist Party members under the membership clause of the Smith Act is barred by Section 4(f) of the Internal Security Act of 1950, which provides that neither office-holding nor membership in any Communist organization "shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute." This provision was inserted in order to prevent the registration provisions of the Internal Security Act from being rendered invalid or nugatory by the Fifth Amendment's guarantee against compulsory self-incrimination. The legislative history of Section 4(f) makes it plain that Congress specifically intended to protect Communist Party members and

officers against prosecution under the very clause of the Smith Act involved in this case.

The Government's attempted distinction (based on the expression "per se") between "mere membership" and "membership with knowledge" is untenable. Membership in the Communist Party, without knowledge that the Party espouses violent overthrow, is not punishable under the Smith Act or any other federal statute. Therefore the Government's position makes meaningless surplusage of the phrase "or of any other criminal statute" in Section 4(f). Furthermore, the Government's argument leads to grotesque consequences under the Internal Security Act. If Section 4(f) protects against prosecution only Communists who do *not* know of any violent Party purposes, it would follow that any Communist having such knowledge could avoid compliance with the registration provisions under the privilege against self-incrimination. Whatever may ultimately be held to be the legal effect of Section 4(f), its purpose would be entirely frustrated if construed so narrowly as the Government suggests.

III. *The Evidence is Insufficient to Support Petitioner's Conviction under the Smith Act.* The statute under which Scales was convicted requires proof of nothing more than membership in the Party and knowledge of its unlawful purposes. Under the constitutional standards enunciated in the *Dennis* case, such proof is insufficient to support a conviction under the Smith Act. Even if the membership clause were to be construed as requiring the same elements and quantum of proof as were specified in the *Dennis* case, the evidence presented against Scales is so stale and flimsy as to be plainly insufficient for either constitutional or statutory purposes. The Government's principal witness on the teachings and objectives of the Communist Party ceased to be a member more than two years before the period covered

by the indictment, and testified to nothing in the Party program that would constitute a "clear and present danger" in the sense of the *Dennis* case. *Cf.* the dissenting opinion in *United States* v. *Mesarosh*, 223 F. 2d 449, 460-61 (C. A. 3), pending here as No. 20, October Term, 1956. Such scraps of evidence as were presented to establish Scales' guilty knowledge and intent are inherently incredible and considerably antedate the period of limitations.

IV. *The Petitioner was Denied a Fair Trial.* (A) The grand jury was illegally impanelled. It was never determined whether or not the jury box contained the names of 300 qualified persons, as the statute (28 U. S. C. 1864) requires. *United States* v. *Silverman*, 129 F. Supp. 496. The court clerks and the jury commissioner illegally delegated their duty to select qualified jurors fairly representative of the community. *Glasser* v. *United States*, 315 U. S. 60; *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217; see *Ballard* v. *United States*, 329 U. S. 187, 195. (B) Prejudicial error was committed in the admission of evidence against Scales. The trial court received much evidence concerning Communist teachings unrelated to the issue of force and violence, and which were of such a nature—*e.g.*, the Party's attitude toward the Negro and his status in the South, and toward the war in Korea—as to inflame the jury against Scales. Prosecution witnesses were permitted to describe remote and irrelevant episodes which were extremely prejudicial. (C) The trial court refused to grant Scales' request, under Rule 17 (c) of the Federal Rules of Criminal Procedure, to examine written statements previously furnished to the Federal Bureau of Investigation by the two prosecution witnesses who testified to having known Scales as a Communist. This was erroneous and plainly prejudicial. *Bowman Dairy Co.* v. *United States*, 341 U. S. 214; *Fryer* v.

United States, 207 F. 2d 134. (D) The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal Security Act of 1950 (50 U. S. C. 781) deprived Scales of the opportunity for a fair and impartial trial on the issue of the Communist Party's violent or non-violent aims. In the face of the Congressional "findings" that the Party contemplates resort to force and violence, no jury could determine this question on the basis of an independent and objective scrutiny of the evidence offered in this case. *Cf. Delaney* v. *United States*, 199 F. 2d 107, 112.

ARGUMENT

This case is the first prosecution under the membership clause of the Smith Act to reach this Court. Another case under that clause is also here on certiorari,[11] and several others are pending in various federal district courts.[12]

The defendants in the *Dennis* case were indicted under the membership clause of the Smith Act,[13] as well as for the conspiracy of which they were convicted. None of them has been tried under the membership indictments, but these have not been dismissed,[14] despite the lapse of eight years. Following the *Dennis* case, there has been a series of Smith Act conspiracy prosecutions, of which two are presently

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[11] *United States* v. *Lightfoot*, 228 F. 2d 261 (C. A. 7), pending here as No. 32, October Term, 1956.

[12] *United States* v. *Blumberg* (E. D. Pa.); *United States* v. *Noto* (W. D. N. Y.); *United States* v. *Weiss* (N. D. Ill.); *United States* v. *Russo* (D. Mass.); *United States* v. *Blum* (S. D. Ind.); *United States* v. *Hellman* (D. Mont.). In addition, there are membership indictments still pending against the defendants in the *Dennis* case. *United States* v. *Dennis*, No. C 128/89 (S. D. N. Y.), and other indictments against Winter, Gates, Davis, Hall, Thompson, Foster, and Stachel.

[13] See *United States* v. *Foster*, 80 F. Supp. 479 (S. D. N. Y. 1948).

[14] See footnotes 12, *supra*, and 17 and 18, *infra*.

here on certiorari.[15] The instant case is one of a handful of individual prosecutions under the membership clause of the Smith Act, instituted by the Government since 1953.[16] It is not for petitioner to state why the Government has invoked the membership clause in these recent cases.[17] However, it is apparent that, if its constitutionality were to be upheld, the membership clause offers the Government much better prospects than do the other provisions of the Smith Act for repeated prosecutions of the same individual.[18]

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[15] *Yates* v. *United States*, Nos. 6, 7 and 8, and *Mesarosh* v. *United States*, No. 20, October Term, 1956. See also *Frankfeld* v. *United States*, 198 F. 2d 679 (C. A. 4, 1952), *cert. denied* 344 U. S. 922; *United States* v. *Flynn*, 216 F. 2d 354 (C. A. 2, 1954), *cert. denied* 348 U. S. 909; *Wellman* v. *United States*, 227 F. 2d 757 (C. A. 6, 1955), petition for certiorari pending, No. 9 Misc. October Term, 1956. There are pending and undetermined in the courts of appeal other Smith Act conspiracy convictions from trials held in Philadelphia, Denver, Seattle, and the Hawaiian Islands. See, respectively, *United States* v. *Kuzma*, Nos. 11,655-663 (C. A. 3); *Bary* v. *United States*, Nos. 5240-46 (C. A. 10); *Huff* v. *United States*, (C. A. 9); *Fujimoto* v. *United States*, No. 13915 (C. A. 9). Still other conspiracy trials have been concluded or are pending in the federal district courts in Cleveland, New York City, St. Louis, New Haven, Boston, and Porto Rico.

[16] See footnote 12, *supra*.

[17] Had the Government proceeded with the trial of the *Dennis* defendants under their membership indictments following their release from prison upon completion of the sentences imposed on them in the *Dennis* case, there would have been the aroma if not indeed the actuality of double jeopardy. Conceivably this circumstance dissuaded the Government from exposing the membership clause to its initial constitutional challenge on the basis of these old indictments, and suggested that it might be tested under less distasteful circumstances in a fresh case against a Party member not previously indicted for conspiracy.

[18] In the case of a member of the Communist Party or other organization who has once been convicted of conspiracy to violate the Smith Act, it might well be difficult for the Government to establish by sufficient proof a conspiracy subsequent to the first indictment, even if the individual openly re-associated with the Party upon being set at liberty. But under the membership clause neither conspiracy nor any act need be charged, and a second prosecution of an avowed member would thereby be greatly facilitated.

I. THE MEMBERSHIP CLAUSE OF THE SMITH ACT IS UNCONSTITUTIONAL UNDER THE FIRST AND FIFTH AMENDMENTS

The petitioner is aware that this Court does not decide constitutional questions unless the posture of the other issues raised in a particular case requires that the constitutional question be confronted. *Peters* v. *Hobby*, 349 U. S. 331; *United States* v. *Rumely*, 345 U. S. 41. In the present case, there are important non-constitutional issues the disposition of which, it is believed, will in any event require reversal of the decision below. But the constitutional and non-constitutional problems overlap considerably, and the case as a whole can perhaps be most clearly and helpfully presented by starting with the historical background and legal characteristics of the membership clause and the constitutional questions which it raises.

A. Historical Background of the Membership Clause

"Guilt is personal", but to say this is to state the problem, not to answer it. The law has long grappled with the question of what degree of association with a crime is sufficient to establish that the individual so associated may fairly be charged with guilt. Out of this enduring problem have developed the legal principles relating to principals and accessories, felony murders, attempts, and conspiracies.

This case involves the associative concept of "membership", familiar in the field of corporations, trade unions, and other aspects of civil law and litigation. But as a criminal concept it is unknown to the common law, and only rarely and in times of great political or economic stress have legislatures undertaken to attach criminal consequences to membership in a group, without reference to some act or concert for purposes of action, such as conspiracy, upon which criminal liability has always depended. Thus in 1799, when Britain was wracked by the Napoleonic wars as well as

by the reform movement and other political crises, Parliament enacted the Unlawful Societies Act,[19] which condemned certain societies by name,[20] as dangerous to "the existence of regular government", and provided that "every person who . . . shall become a member of any such society . . . shall be deemed guilty of an unlawful combination and confederacy."

Another British statute containing a similar provision, enacted in 1817, was directed against societies bound by oaths of secrecy.[21] Apparently prosecutions under these enactments were very infrequent, although as late as 1834 they were invoked against societies of workingmen such as those from which the trade unions were developing.[22] At all events when, a century later, the para-military activities of Sir Oswald Moseley's uniformed adherents assumed proportions thought to be dangerous, Parliament's remedial

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[19]39 Geo. 3 c. 79. This statute had been preceded in 1797 by the Unlawful Oaths Act, 37 Geo. 3 c. 123, which proscribed the formation of societies bound by oaths of secrecy.

[20]The preamble to The Unlawful Societies Act embodies a Parliamentary "finding", not unlike the Congressional findings in the Communist Control Act (50 U. S. C. 841) and the Internal Security Act (50 U. S. C. 781), of the existence of "a traitorous conspiracy . . . in conjunction with the persons from time to time exercising the powers of government in France, to overturn the laws, constitution and government . . . both in Great Britain and Ireland, and to dissolve the connection between the two kingdoms", and of "divers societies of a new and dangerous nature, inconsistent with publick tranquillity and with the existence of regular government, particularly certain societies calling themselves Societies of United Englishmen, United Scotsmen, United Britons, United Irishmen, and the London Corresponding Society . . ." which it was the purpose of the Act to suppress.

[21]The Seditious Meetings Act, 57 Geo. 3 c. 19.

[22]*Rex* v. *Lovelass*, 6 Carr. & Payne 596; *Rex* v. *Dixon*, 6 Carr. & Payne 601 (involving the Cordwainer's Union of Cambridge). Both are *nisi prius* decisions, the first under The Unlawful Oaths Act of 1797 and the latter under The Seditious Meetings Act of 1817. No reported cases under The Unlawful Societies Act of 1799 have been found.

legislation did not undertake to punish membership in the Moseley organization.[23]

In the United States, "membership" as the basis for penal sanctions first assumed importance with the enactment, early in this century, of numerous state statutes punishing "criminal anarchy" and "criminal syndicalism". The New York statute of 1909,[24] sustained by this Court in *Gitlow* v. *New York*, 268 U. S. 652, contains a provision (not involved in the *Gitlow* case) punishing any person who "organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group, or assembly of persons formed to advocate" criminal anarchy. The criminal syndicalism and related state statutes passed immediately following the First World War also commonly contained clauses specifically directed against being or becoming a member of any group or organization espousing the teachings against which the statutes were directed.[25]

The California criminal syndicalism statute[26] came before this Court in *Burns* v. *United States*, 274 U. S. 328 (1927) and *Whitney* v. *California*, 274 U. S. 357 (1927), and the Kansas statute in *Fiske* v. *Kansas*, 274 U. S. 380

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[23]The Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6 c. 6, prohibits quasi-military organizations that organize and train to use force for the achievement of political ends. It is made a criminal offense to take part in the control or management of any such organization, or in the training of its members, but the accused is allowed to show as a defense that "he neither consented to nor connived at the organization . . . in contravention of the provisions of this section."

[24]Laws 1909, c. 88, now sections 160-66 of the Penal Law.

[25]See, *e.g.*, the statutes involved in *People* v. *Steelik*, 187 Cal. 361, 203 Pac. 78 (1921); *State* v. *Dingman*, 37 Ida. 253, 219 Pac. 760 (1923); *People* v. *Lloyd*, 304 Ill. 23, 136 N. E. 505 (1922); *State* v. *Tonn*, 195 Ia. 94, 191 N. W. 530 (1923); *State* v. *Berquist*, 109 Kan. 368, 199 Pac. 101 (1921); *State* v. *Laundy*, 103 Ore. 443, 204 Pac. 958 (1922); *Commonwealth* v. *Blankenstein*, 81 Pa. Sup. Ct. 340 (1923); *State* v. *Hennessey*, 114 Wash. 351, 195 Pac. 211 (1921). In a few of these decisions the membership clause, as distinguished from the more orthodox provisions, was considered and upheld. *State* v. *Hennessey*, *supra*; *State* v. *Laundy*, *supra*. In others its validity was doubted. *People* v. *Lloyd*, *supra*; *State* v. *Tonn*, *supra*.

[26]California Statutes 1919, c. 188, Deering's Penal Code (1949), pp. 773-74.

(1927). As applied to the facts of each case, the California law was held constitutional and the Kansas law unconstitutional. None of the three decisions is governing here, because (although both laws punish membership in an organization advocating criminal syndicalism) none of the defendants was indicted for membership alone, but also for organizing the group in question.[27] In the *Whitney* case, however, Justice Brandeis (in whose opinion[28] Justice Holmes concurred) noted the extraordinary reach of the California statute's membership clause, questioned its constitutional validity, and concurred in the Court's decision only because the defendant had not raised the "clear and present danger" question in the state court, and because there was evidence linking the defendant not only with syndicalist doctrine but also with "a conspiracy . . . to commit present serious crimes."[29]

The similarity between the Smith Act and the New York criminal anarchy statute was noted in the *Dennis* case,[30] and it may reasonably be assumed[31] that the inclusion of the membership clause in the Smith Act is due to the presence of comparable clauses in the state statutes that antedated it by twenty to thirty years. However, there is one significant respect in which the Smith Act clause differs from its New York state predecessor, for the former alone requires knowledge of the Party's unlawful purposes as an element of the offense[32]—a provision added by a Senate

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[27]In both the *Fiske* and *Burns* cases the group was the Industrial Workers of the World; in the *Whitney* case it was the Communist Labor Party of California.

[28]See *Whitney* v. *California, supra,* at pp. 372-80.

[29]*Id.*, at 379-80. See also the *Dennis* case at pp. 513-14.

[30]See the *Dennis* case at pp. 536 and 562, n. 2.

[31]The legislative history of the Smith Act is silent on the source of the membership clause.

[32]In this respect the Smith Act membership clause resembles the California criminal syndicalism law, which specifies "knowingly" as an element of criminal membership, and differs from the Iowa, Washington, and Oregon statutes, which do not. See the *Laundy* and *Hennessey* cases, *supra,* note 25.

amendment to the original bill, which did not require such knowledge.[33]

The Smith Act membership clause does not, however, specify personal intent, to overthrow the government by force and violence, as an element of the offense. Since Congress expressly included the requirement of such intent in the adjacent paragraph of the Smith Act relating to the publication and distribution of subversive printed matter,[34] and since Congress carefully added by amendment the requirement of knowledge but not of intent to the membership clause, it would appear that intent should not be read by implication into that clause.[35]

B. Constitutional Limits on the Scope of the Smith Act.

The Smith Act is a law which proscribes advocacy of overthrowing the Government by force or violence whether by personal exhortation, by printing and disseminating literature, or by organizing or joining groups engaging in such advocacy. In the *Dennis* case, this Court upheld the constitutionality of the advocating and organizing provisions, subject to specific limitations laid down in the Court's opinion as necessary to sustain the constitutionality of the Act under the First Amendment.

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[33]H. R. 5138 (76th Cong., 1st sess.). This bill, introduced by Representative Howard Smith of Virginia, was passed by the House on July 29, 1939 (84th Cong. Rec. 10451-56). It was redrawn in the Senate Committee on the Judiciary, and as amended (with the requirement of knowledge added to the membership clause) it passed the Senate on June 15, 1940 (86 Cong. Rec. 8340-47). The bill was enacted into law as amended.

[34]See the complete statute in the Appendix, *infra*, pp. 47-48.

[35]The "distribution" paragraph of the Smith Act expressly requires an intent to overthrow the Government. The "advocacy" and "organization" paragraphs do not, but in the *Dennis* case it was held (at pp. 499-500) that the inherent nature of advocating or organizing for the violent overthrow of government is such as to require "the inclusion of intent as an element of the crime". Clearly this is not true of membership, which may be of an entirely passive nature, involving no other overt action from which intent might reasonably be inferred.

All of the opinions in the *Dennis* case, including Judge Learned Hand's opinion below[36], are pregnant with awareness that the case presented a problem quite different from what was involved in the *Schenck*, *Gitlow*, and other free speech cases of the post-World War I years. On the one hand imminent (i. e. "present") peril of violent overthrow of the government (the "substantive evil") was, on the record in the *Dennis case*, totally unproved. On the other hand the potential ultimate (i. e. "clear") danger of such overthrow was inferred from the Communist Party's doctrine, leadership, organization, and activities both in the United States and abroad.

The clear and present danger in the *Dennis* case was not the conspiratorial activities, standing alone, of the handful of defendants. Nor was it the Communist Party itself, which was not even under indictment. The danger in the *Dennis* case was the conspiracy of the defendants to advocate and bring about violent overthrow of our Government through and by means of the Communist Party. It was the defendant's concerted and violent objectives, *coupled with* the potent instrumentality utilized for their achievement, that was the basis of Judge Medina's finding (approved by both the Court of Appeals and this Court)[37] that "there is sufficient danger of a substantive evil that the Congress has a right to prevent to justify the application of the statute under the First Amendment of the Constitution."

In Smith Act conspiracy prosecutions, therefore, the impact of the "clear and present danger" rule is to require a *nexus* between the conspirators' violent intent and an instrumentality proportioned to the magnitude of the objective. Conspiracies to obstruct the draft or impede war production may achieve their purpose, at least in part, with relatively modest means. But overthrowing the United

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[36] *United States* v. *Dennis*, 183 F. 2d 201.

[37] See 183 F. 2d at 215-216 and 341 U. S. at 511-515.

States Government is no job for boys. Unless conspirators to this end have laid hold of some engine or organization powerful enough to give cause for alarm under Judge Learned Hand's restatement of Justice Holmes' rule,[38] their conspiracy to advocate force and violence is not constitutionally punishable under the Smith Act.

In the *Dennis* case, the Communist Party was found to be such an organization. Under familiar principles, however, that finding was conclusive only for that case. In each Communist trial under the Smith Act, there must be proof that the Party possesses the dangerous and unlawful attributes that are required under the "clear and present danger" test.

In the free speech cases under the Espionage Act it was quite clear that the defendants were directly and personally responsible for whatever degree of danger had been caused. For example, when Eugene V. Debs made a speech praising those who violated the military draft laws, the danger of the "substantive evil" was directly traceable to Debs, and the only question was whether it was "clear and present" enough. Since even a single speech might "bring about the substantive evil" of obstructing military service, Debs' conviction was upheld. *Debs* v. *United States*, 249 U. S. 211 (1919).

But if Debs (or Schenck or Gitlow) had made a speech advocating that the Government be overthrown by force, under the *Dennis* case there would have been no constitutionally punishable offense, because (in Chief Justice Vinson's phrase)[39] there would have been no "power to bring about the evil" of violent overthrow.[40] Indeed, it is hard to see

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[38]See 341 U. S. at 510 and 183 F. 2d at 212.

[39]341 U. S. at 516.

[40]See also Justice Frankfurter's concurring opinion in the *Dennis* case at p. 542. "Our decision today certainly does not mean that the Smith Act can constitutionally be applied to facts like those in *Gitlow* v. *New York*".

how (short of war) this particular "substantive evil" can become a "clear and present danger" unless by an organization, such as the Communist Party, of such ideological and numerical dimensions that it merits description as a "movement".

Thus the Smith Act Communist prosecutions are the exact converse of the *Debs* case. There the personal responsibility is plain, but the limited power of evil is sufficient to create a danger only if the objective is a relatively narrow one. In the Smith Act cases the Communist Party (if there is judicially satisfactory proof) supplies the power to create the danger of violent overthrow, and the question of personal responsibility at once emerges as the crucial issue.

This Court's opinion in the *Dennis* case manifests its full awareness of the thorny questions of personal guilt or innocence laid open by its decision bringing the Communist Party within the possible scope of the "clear and present danger" rule. The possibilities of non-criminal affiliation with such an organization—embodying a century-old dialectic and dogma, world-wide in aspiration and activity, and espousing a variety of viewpoints appealing even to many who are repelled by the monolithic and despotic features of Communism—are extensive and well-known to be so.

It is in the light of these considerations that the factors specified in the *Dennis* case, as constitutionally necessary elements of guilt under the Smith Act, must be viewed. These elements are not haphazard; on the contrary, they sharply reflect the real problems of national security, personal liberty, and individual responsibility that necessarily attach to prosecutions of Communists under our constitutional system. There are three specific requirements stated in the *Dennis* case which are especially pertinent to the constitutionality of the membership clause.

(1) *Conspiratorial Power.* In view of the immensity of the "substantive evil" against which the Smith Act is

directed, it is absurd to think of a "clear and present danger" caused by an individual. Governments are not overthrown by individuals, but by conspiracies, juntas, and movements. "It is the existence of the conspiracy which creates the danger", as Chief Justice Vinson wrote in the *Dennis* case (at p. 511), while Justice Jackson observed (at p. 577): "There is no constitutional right to 'gang up' on the Government." It is the conjunction of the conspiracy to destroy the government with the strong instrumentality of the Communist Party (assuming that the Party's similar purpose has been established) that constitutes the clear and present danger, as all of the majority opinions in the *Dennis* case make clear.[41] To support a Smith Act conviction of Communists, therefore, the accused must be shown to have been so connected with the Party that they could exploit its power to bring about the "substantive evil" of violent overthrow. Guilty activity in and through the Party must, as was ruled in the *Dennis* case (at p. 516), be such as to establish not only the defendants' evil intent but also that "the nature of their activities" and "their power to bring about the evil" are so great as to justify a determination that their conspiracy created a "clear and present danger" to national security.

(2) *Incitement.* The substantive offense punished by the Smith Act is not discussion, but advocacy of action. In the *Dennis* case, this Court showed great concern that the Act be not construed to penalize the exposition and analysis of ideas, however unpopular,[42] and Justice Frankfurter noted that:[43] "Throughout our decisions there has recurred a distinction between the statement of an idea which may prompt its hearers to take unlawful action, and advocacy that such action be taken." At the trial, Judge Medina instructed the jury to determine whether the defendants

[41] See 341 U. S. at pp. 498, 511, 546-48, 564-66.
[42] *Id.* at 501-02, 544-46, and 572.
[43] *Id.*, at 545.

conspired to advocate violent overthrow "by language reasonably and ordinarily calculated to incite persons to such action." That instruction was subsequently approved by this Court as specifying one of the essential elements of the crime.[44]

(3) *Personal Intent to Overthrow the Government.* This was likewise specified in the *Dennis* case (at pp. 499-500 and 516) as a constitutional element of Smith Act guilt. Furthermore, the intent is insufficient if it relates to the indefinite future; under the *Dennis* case (at pp. 511-12) it must be an intent to overthrow the government "as speedily as circumstances would permit."

It is perhaps only theoretically possible that an individual Communist might intend to overthrow the Government but remain ignorant of the Party's program. But it is both theoretically possible and practically certain that one—indeed many—who know the Party program may lack the specific intent. The undercover agent who joins the Party to report its personnel and activities to the Government presumably knows the Party's illegal purposes, but surely lacks intent. The individual who joins the Party because he believes it to be an effective avenue for the achievement of some socio-economic goal such as unionization or the abolition of racial restrictions, may be entirely lacking in violent or unlawful intent of any kind, whether or not he knows of the Party leadership's subversive purposes. Examples could readily be multiplied.

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[44] *Id.*, at pp. 511-13. See also the dissenting opinion of Justice Reed (concurred in by Justices Burton and Minton) in *Pennsylvania v. Nelson*, 350 U. S. 497, 516: "We look upon the Smith Act as a provision for controlling incitements to overthrow by force and violence the Nation, or any State, or any political subdivision of either."

C. Constitutional Deficiency of the Membership Clause under the First and Fifth Amendments

For all that appears from the indictment under which Scales was convicted, he never met another member of the Communist Party, much less discussed or plotted the violent overthrow of our Government with any other members. There is no charge that he ever heard anyone advocate the overthrow of government, much less that he himself ever engaged in such advocacy. There is no charge that he ever engaged in any Party activity.

No concert of action or intention with any other person is charged against Scales. Indeed, no act of any kind whatsoever is charged; the accusation is purely one of status (membership) and state of mind. There is no charge that Scales, alone or in collaboration with any one else, ever planned or contemplated that violent overthrow would be advocated by anyone; *a fortiori* the indictment does not charge that such advocacy would be in language calculated to incite other persons to unlawful action.

In short, the indictment charges nothing more than a state of mind comprising knowledge and intent,[45] manifested in the external world by nothing more than non-conspiratorial membership in the Communist Party, unsupported by any charge of Party contacts or activities. It is too plain for argument that such a charge wholly fails to satisfy the requirements stated in the *Dennis* case, and violates the First Amendment to the Constitution.

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[45] As noted *supra*, p. 17, the membership clause does not specify intent as an element of the crime, and of course this defect cannot be cured by adding the allegation to the indictment, as was attempted here. *Thornhill* v. *Alabama*, 310 U. S. 88. But even if intent is read by implication into the membership clause, its constitutionality would not be saved, and the analysis of the constitutional question herein assumes, contrary to Congress' apparent purpose, that intent is a requirement by implication under the membership clause.

In its efforts to defend the constitutional validity of Scales' conviction, the Government finds itself obliged to forget that this is not a conspiracy case. Their brief (in response to the petition for certiorari) specifies (at p. 10) as one of the "crucial elements" in the *Dennis* case the defendants' "active participation in support and furtherance" of the Communist Party and its unlawful objectives, and then blandly asserts that this element "is clearly present here". But if "active participation" is present in Scales' case, it is certainly not in either the indictment or the statute on which the indictment is based. Whatever the purport of the evidence about Scales' Party activities may be,[46] it is wholly irrelevant to the constitutionality of the membership clause and the validity of the indictment. The defendants in the *Dennis* case "actively participated" by conspiring with each other and taking action in furtherance of unlawful purposes. But Scales is charged neither with conspiring nor acting.

The court below leaped at the constitutional hurdle by simply equating the membership clause with conspiracy[47]: "The membership clause of the statute is, of course, nothing more nor less than a statute denouncing and making criminal a conspiracy to overthrow the government by force and violence. It is elementary that a conspiracy is a partnership in criminal purposes . . . ". But who were Scales' partners? They are not named in the indictment, and it is "elementary" that a conspiracy charge requires more than one conspirator.[48] Scales has not been indicted for conspiracy, and of course his conviction can not be sustained by erroneously assuming that he was. As Justice Brandeis observed in

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[46] *Infra*, pp. 35-37.

[47] See 227 F. 2d at 587, and R. 123.

[48] See *United States* v. *Rabinowich*, 238 U. S. 78, 88 (1915); Ferdinando Pulton, *De Pace Regis et Regni* (London, 1615), pp. 232-33. Under the federal conspiracy statute, overt acts must also be alleged in the indictment.

Whitney v. *California*, 274 U. S. 357, 372-73, statutes such as the membership clause purport to create "a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly."

In weighing the constitutionality of the membership clause, the Fifth Amendment must be considered as well as the First. No more than many others is the phrase "guilt by association" self-defining, but it is not meaningless. Its meaning is not abstruse: a man may be held criminally liable only for his own conduct, or for the conduct of others in some form of concert or combination which is recognized by our law as warranting holding an individual participant responsible for the acts of other participants. "Membership" is not such a recognized combination. Joint participation in a felony is, and so is conspiracy. But courts and legislatures alike have remained awake to the dangers of injustice that surround imputed guilt, and have erected a variety of safeguards against oppressive consequences.

To attach criminal consequences to "membership", unaccompanied by acts or declarations that might bring the charge within the ambit of associative concepts known to our law, would so far extend the notion of imputed guilt as plainly to violate the due process clause of the Fifth Amendment[49] and, in the circumstances of this case, the First Amendment as well. The "dangers to the liberty of the individuals and the integrity of the judicial processes

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[49] John Lord O'Brian, *National Security and Individual Freedom* (1955), at p. 27-28:

"The Smith Act of 1940 *made it unlawful* for any person to be or to become a member of or affiliate with any society, group, or assembly which teaches, advocates, or encourages the overthrow or destruction of any government in the United States by force or violence. These statutes, therefore, imported into our law the alien doctrine of guilt by association, which up to this time had been regarded as abhorrent and which had never been recognized either by the courts or by the Department of Justice, even during the perils and excitements of the First World War."

that are inherent in conspiracy charges" were strongly delineated by the late Justice Jackson, concurring in *Krulewitch* v. *United States*, 336 U. S. 440, at 457. But at least the dangers of the conspiracy concept are known to and limited by judicial practice.

In a conspiracy case, the conspirators (two or more) must be identified, and the prosecution must prove an agreement among them "to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy". See *United States* v. *Falcone*, 311 U. S. 205, 210. Assistance and support even to those known to be engaged in crime does not establish conspiracy with them, lacking any agreement to pursue the unlawful ends. *United States* v. *Falcone, supra; Butler* v. *United States*, 197 F. 2d 561 (C. A. 10, 1952). Nor does unlawful intent satisfy the requirements, for:[50]

> "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself . . ."

But the charge against Scales covers no agreement or plot of any kind. It rests solely on knowledge and intent (assuming that intent is read into the clause).[51] In a conspiracy there must be evidence of affirmative conduct by the defendant in aid of the criminal agreement among the parties—what Justice Rutledge called "informed and interested cooperation, stimulation, instigation." See *Direct Sales Co.* v. *United States*, 319 U. S. 703, 713. As Judge Learned Hand has put it, a conspirator "must in some sense promote . . . [the] venture himself, make it his own, have a

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[50] *Mulcahy* v. *Regina*, L. R. 3 H. of L. 306, 317 (1868).

[51] *Supra*, pp. 17 and 23.

stake in its outcome." *United States* v. *Falcone*, 109 F. 2d 579, 581 (C. C. A. 2, 1940); see also *United States* v. *American Precision Products Corp.*, 115 F. Supp. 823, 826 (D. N. J. 1953). But nothing like this has been charged against Scales.

Flexible as are the required elements of conspiracy, they serve to specify the charge of guilty connection with crime in terms long familiar in the courts. But the charge of "membership" serves no such purpose, and is unknown to legal process as a basis of criminal liability. Justice Brandeis' strictures on the validity of the membership clause in the California criminal syndicalism statute are directly applicable here:[52]

> "The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.
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> ". . . I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a prole-

[52] *Whitney* v. *California*, 274 U. S. 357, 372-73, 379. *Cf.* the line of cases invalidating state statutes such as one which undertook to punish "associating with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers and gamblers . . ." *The City of St. Louis* v. *Roche*, 128 Mo. 541, 31 S. W. 915 (1895); *Ex parte Smith*, 135 Mo. 223, 36 S. W. 628 (1896).

tarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment . . ."

That there are few precedents in the books merely underlines the novel character of the membership clause. When occasion has offered, this Court has not hesitated to strike down statutes under which the degree of connection between the defendant, and the alleged criminal conduct of others, was far less tenuous than it may be under the membership clause. *DeJonge* v. *Oregon*, 299 U. S. 353; *Herndon* v. *Lowry*, 301 U. S. 242; see also *American Communications Ass'n.* v. *Douds*, 339 U. S. 382, 402-04.

If the membership clause is now to be weighed in the constitutional scales, all these traditional principles manifestly require that it be held invalid under the First and Fifth Amendments.

II. THE INDICTMENT FAILS TO STATE AN OFFENSE UNDER THE LAWS OF THE UNITED STATES

In any prosecution of a Communist Party member under the membership clause, the question of the effect of Section 4(f) of the Internal Security Act of 1950 is posed *in limine*. For if Section 4(f) is given the effect that logical analysis requires and the legislative history supports, it is a bar to such prosecutions.[23] Accordingly, the indictments in this and similar cases fail to state an offense under the laws of the United States.

Section 4(f) provides that neither Communist membership nor office-holding "shall constitute per se a violation

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[23]Since Section 4(f) applies only to prosecutions of members and officers of "any Communist organization", it does not repeal the membership clause of the Smith Act, which applies to membership in any organization of persons who advocate violent overthrow of the government. Rather, Section 4(f) limits the scope of the clause by excluding the category of persons specified in Section 4(f).

of subsection (a) or subsection (c) of this section or of any other criminal statute". The court below, relying on the phrase "per se", held (227 F. 2d at 589) that Section 4(f) does not apply to Communists "who hold membership in the organization with guilty knowledge of its criminal purpose to bring about the violent overthrow of the government". Such membership is not "mere" (i.e. "per se") but "with knowledge", and this added element removes it from the scope of Section 4(f).[84]

The effect of this construction, obviously, is to limit Section 4(f) to Communists who do *not* have the stipulated knowledge. But this is wholly incompatible with the structure and purpose of the Internal Security Act in general and Section 4(f) in particular.

A. Legislative History of Section 4(f) of the Internal Security Act of 1950

Section 2 of the Internal Security Act (50 U. S. C. 781) embodies a "Congressional finding of necessity" in which "Congress finds" that (paragraphs 6 and 15) the Communist movement in the United States, including Communist organizations that "designate themselves as political parties", is "an organization . . . rigidly and ruthlessly disciplined . . . seeking to advance a moment when . . . overthrow of the Government of the United States by force and violence may seem possible of achievement . . ." in order to set up a "Communist totalitarian dictatorship" which will be "subservient" to other such dictatorships. There is no doubt, in the light of this finding, that Congress in enacting

[84] The Court of Appeals also relied (227 F. 2d at 589) on Section 17 of the Internal Security Act (50 U. S. C. 796), which provides that: "The foregoing provisions of this subchapter shall be construed as being in addition to and not in modification of existing criminal statutes". On familiar principles of construction, however, this general provision does not override the specific reference in Section 4(f) to "any other criminal statute". *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204.

the Internal Security Act regarded the Communist Party as a group of persons who advocate and encourage the violent overthrow of our Government, such as is described in the Smith Act.

Section 4(a) of the Internal Security Act makes it a crime "knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . under the domination or control of any foreign government . . . organization . . . or . . . individual". Sections 7 and 8 of the Act (50 U. S. C. 786-87) provide for compulsory registration, under severe criminal penalties for failure, of Communist organizations and members. Especially in view of the "Congressional finding" in Section 2, it is obvious that the registration provisions raise serious questions of self-incrimination for Communist members under Section 4(a). It was in order to deal with this problem that subsection (f) was originally added to Section 4, as the legislative history indisputably shows.

In the Eightieth Congress, the precursor bill, known as the Mundt Nixon bill,[55] contained no immunity provision of any kind. In the next Congress, and while a successor bill[56] was under consideration in the Senate Judiciary Committee, the late John W. Davis pointed out, in a letter to the Committee, that the compulsory registration provisions might be unconstitutional as compelling self-incrimination under the section of the same bill making it a crime to conspire to establish a foreign-controlled totalitarian dictatorship in the United States.[57] This letter appears to have instigated the language thereafter inserted in both House and Senate that developed into Section 4(f) of the Act.

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[55]H. R. 5832 (80th Cong., 2nd Sess.). This bill passed the House, but died in the Senate.

[56]S. 2311 (81st Cong., 1st Sess.).

[57]S. Rep. No. 1385, 81st Cong., 2nd Sess., pp. 43-44.

The House bill[58] was reported out with a provision which merely forbade the receipt in evidence of the fact of registration in prosecutions under the Internal Security Act itself. On the floor, Congressman Celler pointed out that this provision was not only deficient under the rule of *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892), but also that it furnished no protection against prosecutions under the Smith Act.[59] Shortly thereafter the manager of the bill[60] offered an amendment, adopted *viva voce*, which granted the same protection against prosecutions "for any alleged violation of any other criminal statute."

The Senate bill[61], in the meantime, was reported out with a provision that neither membership nor office-holding in any Communist organization should constitute a violation of the Internal Security Act. In a minority report,[62] Senator Kilgore pointed out this provision "does not even purport to avoid self-incrimination in relation to the membership clause of the Smith Act." The same criticism was made on the Senate floor by Senators Humphrey, Lehman, and Kefauver,[63] but it was not amended in this respect prior to its passage by the Senate. In conference, however, Section 4(f) assumed the form in which it was enacted into law, and it was there that the words "per se" and "or of any other criminal statute" were added to the first sentence,[64] with which we are presently concerned.

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[58]H. R. 9490 (81st Cong., 2nd Sess.), passed by the House on August 29, 1950.

[59]96 Cong. Rec. 13739-13740.

[60]96 Cong. Rec. 13761. The manager was Congressman Wood, who was also then Chairman of the Un-American Activities Committee. His amendment, of course, accomplished nothing in terms of the *Counselman* case, *supra*.

[61]S. 4037 (81st Cong., 2nd Sess.).

[62]S. Rep. 2369, Part 2 (81st Cong., 2nd Sess.).

[63]96 Cong. Rec. 14190, 14479, 15198-99.

[64]H. Rep. No. 3112 (81st Cong., 2nd Sess.); 96 Cong. Rec. 15280.

B. Section 4(f) is a Bar to the Prosecution of Communist Party Members and Officers under the Membership Clause

This conclusion follows inevitably from the logic and legislative history of Section 4(f). Plainly, Congress added the words "or of any other criminal statute" with the membership clause specifically in mind. And the Government (as well as the court below) misses the essential point when it argues, as it does in its brief in response to the petition for certiorari (pp. 13-14), that Section 4(f) was not intended to modify any other statute but only "to insure the enforceability of the registration provisions of the . . . Internal Security Act . . . by making the privilege against self-incrimination unavailable as a defense to failure to register.". For that could only be accomplished by giving Communist registrants immunity from prosecution on the basis of membership.[85] If the words "or of any other criminal statute" do not apply to the Smith Act, they are meaningless surplusage, for there is nothing else for them to accomplish.

The distinction drawn below between "mere membership" and "membership with knowledge"[86] is untenable. Whatever may be held to be the legal effect of Section 4(f), its purpose would be entirely frustrated by confining its scope in accordance with the decision below in this case. For the lower court's construction would exclude from its coverage all Communists who know the objectives of the Communist organization to which they belong, as found by Congress in Section 2 of the Act. It would thus be an inevitable consequence of the decision below that Communists who know the Congressionally-found purposes of their

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[85]Whether or not Section 4(f) successfully accomplishes its intended purpose is another question, not here at issue. *Cf. Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115.

[86]227 F. 2d at 589.

organization are given no immunity under Section 4(f) and could plead the privilege against self-incrimination to avoid compliance with the registration provisions, which thus would be binding only on Communists who do *not* know their organization's purposes.

In short, the construction adopted below turns the entire statute into an absurdity. Plainly, membership "per se" means membership without other criminally significant acts or declarations, not membership without knowledge of the purposes of the group. No other interpretation accords with common sense and the plain purpose of the provision.[67]

Perhaps to say more is to heap Pelion on Ossa. At this risk, it may be added that in 1954 Congress, during the debates on the bill that became the Communist Control Act of 1954 (50 U. S. C. 841-844), again manifested its understanding that Section 4(f) of the Internal Security Act bars the prosecution of Communists for membership with knowledge.[68] To the original bill (S. 3706, 83rd Cong. 2nd Sess.), Senator Humphrey offered an amendment containing a Congressional finding (parallel to that in Section 2 of the Internal Security Act) that the Communist Party aims to overthrow the Government by force and violence, and a

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[67] *Cf. United States* v. *Ginn*, 222 F. 2d 289, at 290-91. It should also be noted that both Sections 4(a) and 4(c) make knowledge an element of the crimes they proscribe, so that if Section 4(f) were construed to cover only membership without knowledge, it would be operative only with respect to persons who would not in any event be liable under Sections 4(a) and 4(c). This applies equally to the membership clause of the Smith Act which punishes membership only if accompanied by knowledge, so that the phrase "of any other criminal statute" would likewise be robbed of all operative effect.

[68] Of course, there is no suggestion here that the Communist Control Act of 1954 amended or repealed the membership clause, as the Government misconstrues the argument in its brief in response to the petition for certiorari (at p. 14). The argument is simply that the legislative history of the Communist Control Act reinforces the conclusion that Section 4(f) of the Internal Security Act limited the application of the membership clause by excluding Communist organizations from its coverage.

criminal proscription of membership in the Communist Party with knowledge of its purposes. 100 Cong. Rec. 14208. This, of course, was substantially the same as the "membership clause" of the Smith Act.[69]

Had the penal provisions of the Humphrey amendment been enacted, they might have operated as a *pro tanto* repeal or modification of Section 4(f) of the Internal Security Act—i.e., they might have reinstated the liability of Communists to prosecution for membership with knowledge under the new legislation *or* under the membership clause of the Smith Act. This, in turn, would have greatly fortified the plea of self-incrimination by Communist Party members under the registration provisions of the Internal Security Act—the very eventuality which it was the purpose of Section 4(f) to avoid. In short, Congress confronted in 1954 the identical problem it had confronted in 1950.

And so, as a result of representations from the Attorney-General and objections from many Senators and Representatives (*e.g.* 100 Cong. Rec. 14611, 14640, 14711, 14713, 14719) the criminal sanctions for membership were stricken from the Humphrey Amendment, and thus Section 4(f) of the Internal Security Act was left intact and operative to bar the prosecution of Communists for membership with knowledge, whether under that Act, the membership clause of the Smith Act, or "any other criminal statute".

Accordingly, the indictment does not charge the petitioner with any offense under the laws of the United States, and the judgment below must be reversed.

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[69] The principal difference, irrelevant here, was that, since the Communist Party was specifically named in the Humphrey Amendment, presumably no proof of its violent purposes would have been required.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT PETITIONER'S CONVICTION UNDER THE SMITH ACT

In affirming the convictions of the defendants in the *Dennis* case, *supra*, this Court stated (at p. 516): "Where there is doubt as to the intent of the defendants, the nature of their activities, or their power to bring about the evil, this Court will review the convictions with the scrupulous care demanded by our Constitution." In accordance with this declaration, the Court has recently undertaken to review two cases[70] where such doubts have been raised. They are raised even more sharply in the case of Scales.

Intent, activities, and power of evil must be gauged by reference to the indictment and the evidence. The sufficiency of these is a constitutional as well as a statutory question. It is constitutional because, under the rule in the *Dennis* case, the Smith Act's impingement on the First Amendment is warranted only in cases where the evidence sufficiently establishes intent, activities, and power of evil that constitute a "clear and present danger."

A. The Evidence with Respect to Petitioner

Whatever difficulties and close questions the evidence may present in other Smith Act cases, there are few here. No conspiracy has been charged and proved, nor has any advocacy or incitement. To be sure, no such charge or proof is required under the membership clause, but this circumstance does not enhance the sufficiency of the evidence for First Amendment purposes.

The Government offered considerable evidence of Scales' activity as a Party functionary, upon which it heavily relies[71] to establish Scales' knowledge of the Party's

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[70] *Yates* v. *United States* and *Mesarosh* v. *United States*, both *supra* note 15.

[71] See the Government's brief in response to the petition for certiorari, at pp. 5-9.

unlawful aims. But of course Party activities, extensive though they may be, do not necessarily constitute evidence of personal knowledge or intent. As Judge Dimock observed during a Smith Act conspiracy trial:[72] "I think there must be some showing that the activities were such as to bring them [the defendants] in contact with the particular tenets of the Party that are treated as illegal . . ." Mere attendance at Party meetings is poor evidence of knowledge and no evidence of personal intent to overthrow the Government as soon as possible. To support such inferences, the Party activities must somehow be "in contact with" the Party's unlawful aims.

In fact, the evidence with respect to Scales' knowledge (required by the membership clause) and intent (not so required but constitutionally necessary) is so stale and sparse as to be plainly insufficient for either constitutional or statutory purposes. The only testimony relating to any declaration by the defendant or in his presence, wherein overthrow of the Government by force is directly adverted to, concerns a conversation (R. 35) in December, 1948—nearly six years before indictment and three before the limitations period—under circumstances casting such doubt on the credibility of the testimony[73] that it can not possibly support the judgment of conviction. The testimony of the single prosecution witness, Childs (R. 65-96), who parti-

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[72] *United States* v. *Flynn*, C. 136-7 (S. D. N. Y.), aff'd 216 F. 2d 354, convictions of two defendants set aside, 130 F. Supp. 412. The quotation is from the colloquy during argument on motion for a directed verdict of acquittal (Tr. 9961 of C. 136-7).

[73] Scales' alleged statements were said to have been made during his second meeting, and first conversation about the aims of the Party (R. 33-36), with Clontz, an observer for the Federal Bureau of Investigation. Although Clontz saw Scales frequently for the next two years and joined the Party in 1950, he testified to no subsequent declarations of this sort. Assuming that Scales harbored a predilection for violent overthrow, it is most unlikely that he would have revealed it to Clontz as almost a complete stranger in 1948, but never to him as a fellow Party member thereafter.

cipated with Scales in Party affairs during the limitations period, concerns activities that are highly controversial and declarations that are certainly anathema to most Americans, but contains nothing that could possibly support Scales' conviction under the Smith Act.

In the upshot, the prosecution's case amounted to little more than Lautner's testimony about the aims of the Party (none of which was connected with Scales) and that of Clontz and Childs about Party activities and declarations in North Carolina which the jury no doubt found incomprehensible and repugnant, but which were not shown to be unlawful or directed to unlawful ends. There was little to support the verdict other than inferences that might be drawn from Scales' Party membership and office-holding, and these are not sufficient under the Constitution or the Smith Act as expounded in the *Dennis* case. Referring to persons debarred from naturalization for advocacy of violent overthrow of the Government, Justice Reed, dissenting in *Bridges* v. *United States*, 346 U. S. 209, at 234, observed that "there is no necessary identity in law between Communist Party members and such persons". The Government must establish far more than Party membership and activity in order to prove guilty knowledge and intent.[74] But in this case the prosecution was empty-handed, and Scales' conviction must be reversed.

B. The Evidence with Respect to the Communist Party

Finally, the prosecution's evidence in this case with respect to the aims and purposes of the Communist Party

[74] See *People* v. *Lloyd*, 304 Ill. 23, 88, 136 N. E. 505, 530 (1919), *per* Thompson, C. J. (under an Illinois statute comparable to the Smith Act): "Individuals ought not to be condemned for mere membership in organizations, nor should they be held to believe in, advocate, and work to accomplish every word, sentence, or plank in their party platforms . . . There must be proof of a conscious guilt by individual action before it can be said that the individual adopts and approves the language of the party platform."

falls far short of the standards of proof applied in courts of law. Whatever one's personal views on this subject may be, when the Government brings a charge against a Communist under the Smith Act, the charge must be proved.

The Government's principal witness in this matter, Lautner, left the Party in January, 1950, almost two years before the statutory period covered by the indictment. In the conspiracy cases under the Smith Act, testimony antedating the limitations period has been admitted on the theory of a continuing state of facts, but it has never been held sufficient *standing alone* to support the ultimate conclusion.[75]

Taken at face value, Lautner's testimony on the crucial issue of advocacy of force and violence was reduced on cross-examination to an expression of personal opinion that the Party advocates forceful overthrow, despite contrary statements by various Party officials and in Party publications (R. 29-31). This witness, who frequently takes the stand for the Government in Smith Act and other cases where the nature of the Party is an issue, also testified in the *Mesarosh* case, *supra*. Judge Hastie, dissenting,[76] concluded that (223 F. 2d 449, at 463-64):

> ". . . Lautner's opinion was given merely in terms of a generalized revolutionary goal of the Communist group . . .
>
> "Lautner did not point to a single thing indicating that the 1945 program contemplated, beyond inculcation of belief in and approval of an ultimate revolution, teaching that the time had now come to work for the overthrow of the existing government as soon as possible . . .

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[75]As strongly indicating the contrary, see *United States* v. *Dennis*, 183 F. 2d 201, 231: "It is *toto coelo* a different question whether we are treating them [circumstances prior to the statutory period] as *media concludendi*, or as the *factum* itself". See also *United States* v. *Lustig*, 16 F. R. D. 378, 379: "It cannot be said with any degree of certainty that the aims and objectives of the Communist Party over a period of many years were identical".

[76]Judge Maris concurred in Judge Hastie's opinion.

> "If Lautner did not indicate any proximity of the violence against government said to be contemplated by the 1945 program, I have not found such evidence elsewhere in the record."

It is on the basis of such slender evidence of Party aims, and without any proof of his violent intentions, or knowledge of or participation in unlawful activities, that Scales has been convicted and sentenced to prison for six years. If the evidentiary standards announced in the *Dennis* case are to retain any practical significance, this judgment must be reversed.

IV. THE PETITIONER WAS DENIED A FAIR TRIAL

The petitioner's indictment and trial were vitiated by numerous prejudicial errors, of which four are before this Court for review on certiorari.

A. The Grand Jury was Illegally Impanelled

Prior to the trial, petitioner filed a motion challenging the grand jury panel which returned the indictment. The hearing showed (R. 2-8) that the method for securing names of the panel was that the clerks and jury commissioner requested various individuals, such as local sheriffs, superintendents of public schools, bank presidents, and the Chairman of the Republican and Democratic Parties in the counties in the District, to provide the names of persons who were "suitable for jury service" (R. 2-4). The only information received by the jury commission concerning these prospective jurors was their names and addresses. No questionnaires were ever sent to the members of the jury panel either prior to or after placing their names in the box, nor were the individuals who were asked to supply names for jury service ever informed of the qualifications for jurors (R. 4).

The federal statutory provisions (28 U. S. C. 1861 and 1864) governing the qualifications and methods of selecting grand and petit jurors are set forth in the Appendix (*infra*, pp. 51-52). The statute expressly provides that the names of grand and petit jurors shall be "publicly drawn from a box containing the names of not less than 300 qualified persons at the time of each drawing." This provision is mandatory and places upon the jury commission the non-delegable responsibility to see that the panel is drawn from among at least 300 persons, duly qualified in accordance with the statutory standards.

It is apparent that the method used here did not meet the statutory requirements. It was impossible for the jury commission to know whether or not the box contained the names of 300 qualified persons at the time of the drawing. All that the jury commission knew was the name of the person and his address.[77] The commission knew nothing of the prospective juror's age, ability to read and write, mental or physical condition, character, intelligence or previous penal history. Nor were the persons who supplied the names informed of the qualifications for jurors.

The purpose of the statutory scheme for jury selection is to provide qualified jurors who are fair and impartial. A person presented before a grand jury, as well as the Government, has the right to have the prospective jurors drawn from a box containing the names of three hundred qualified jurors. In *United States* v. *Silverman*, 129 F. Supp. 496 (D. Conn. 1955), a challenge to the grand jury panel in a Smith Act case was upheld; and the indictment dismissed. The court held (at p. 511):

> "The failure by the jury commission to have determined that there were at least three hundred quali-

[77] In some cases, the people who supplied the names commented on some of the individuals, such comments being usually that they were fit for jury service (R. 4).

fied names in the box at the time of the drawing of the grand jury . . . was a breach of the affirmative statutory duty imposed upon the commission and is fatal to the indictment . . ."

This defect in the procedure of selecting jurors, which was caused by the nonfeasance of the jury commission, invalidates the conviction even without a showing of prejudice to the defendant. For ". . . reversible error does not depend on a showing of prejudice in an individual case. . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts". *Ballard* v. *United States,* 329 U. S. 187, 195.

The method of selecting jurors was also an illegal delegation of the jury commission's duties. It is the duty of the clerk to select the names that go into the jury box, and that duty cannot be delegated. *Glasser* v. *United States,* 315 U. S. 60; *United States* v. *Murphy,* 224 Fed. 554. The names supplied by sheriffs, superintendents of schools, presidents of banks, and Chairmen of the Republican and Democratic Parties would be most unlikely to result in a panel consisting of a fair cross-section of the community. Under such circumstances, the jury panel is invalid. *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217.

B. Prejudicial Error was Committed in the Admission of Evidence Against the Petitioner

The trial of Scales was conducted on the apparent assumption that once it had been shown that he was a Communist, anything ever said or written by any other Communist was admissible against him, to prove the unlawful aims of the Communist Party. The result was the erroneous admission of much damaging evidence which

was not binding on Scales, and much that was irrelevant to the issues in the case and highly inflammatory.[78]

For example, the trial judge admitted a large amount of evidence concerning political, social, and economic causes supported by the Communist Party, that bore no relation to the issue of force and violence. Thus the witness Childs was allowed to testify (R. 78-79 and 91) to anonymous Communist statements to the effect that "the Communist Party does not look upon the Negro question as a question of a minority group . . . it looks upon the Negro question as a question of a Negro nation . . . concentrated in Virginia, North Carolina, South Carolina, and down throughout the South, and . . . these people have the right to set . . . up an entirely separate nation in the South because of Stalin's definition." The same witness testified to other hearsay declarations of Communists about the war in Korea (R. 81, 85) which were equally irrelevant and calculated to antagonize and prejudice the jury.

Likewise, the prosecution witnesses were permitted to describe episodes that bore in no way on the issues, but were exceedingly prejudicial. Childs, for example, described (R. 93-94 and 96) a "demonstration" at a Party school (not part of the curriculum but during a recess) at which a Communist explained how a pencil could be used to kill a man on a picket line. The prosecuting attorney was not bashful about exploiting testimony of the foregoing type in his summation to the jury (R. 105-106).

Equally serious was the trial court's admission of extensive testimony by Lautner and Clontz concerning acts and declarations of third persons that did not take place in Scales' presence. The court below approved the receipt of this evidence (227 F. 2d at 589) as showing "the teachings

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[78] Evidentiary issues of this type are common to many Smith Act appeals, and are presently before this Court for review in the *Lightfoot* and *Mesarosh* cases, *supra*, respectively notes 11 and 15.

carried on by the Party". But the governing issue was what Scales understood those teachings to be, and evidence of other persons' acts or declarations would be competent only if shown to be in the presence or range of perception of the accused. As this Court declared in *Schneiderman* v. *United States*, 320 U. S. 118, 147:

> ". . . it is normally true . . . that it is unsound to impute to an organization the views expressed in the writings of all its members, or to impute such writings to each member."

C. Prejudicial Error was Committed By Denial of Petitioner's Request to Examine Written Statements Furnished to the Federal Bureau of Investigation by Prosecution Witnesses

Before trial the defendant moved (Rule 17(c) of the Federal Rules of Criminal Procedure) to examine the written statements previously furnished to the Federal Bureau of Investigation by the prosecution witnesses Clontz and Childs. The trial judge did not grant the motion, but examined the statements himself *in camera* after the witnesses had testified, to determine whether there were inconsistencies between the reports and the testimony. The judge stated, however, that he would not consider an omission of any matter testified to as an inconsistency (R. 96). He found no inconsistency.

The court's refusal to allow the defendant to examine these statements of witnesses who had taken the stand was prejudicial error. See *Bowman Dairy Co.* v. *United States*, 341 U. S. 214, 221, where it was held that ". . . any document or other materials, admissible as evidence, obtained by the Government by solicitation or voluntarily from third persons is subject to subpoena." See also *Fryer* v. *United States*, 207 F. 2d 134; *United States* v. *Bryson*, 16 F. R. D.

431; *United States* v. *Schneiderman*, 106 F. Supp. 731.[79] It is one of the functions of cross-examination to develop inconsistencies in a witness' testimony, and the Court should not usurp this function.[80] Furthermore, the court was plainly wrong in ruling that it would not regard omissions as having evidential significance. It is a general principle of evidence that "a failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact." 3 Wigmore, *Evidence* (3d.Ed., 1940) 733. The defendant was entitled to bring any inconsistency or omission to the jury's attention, and the Court's refusal to allow this denied petitioner a fair trial.

D. A Fair Trial was Precluded by the "Congressional Findings" in the Internal Security Act of 1950 and the Communist Control Act of 1954.

The "Congressional findings" in the Communist Control Act of 1954 (50 U. S. C. 841) and the Internal Security Act of 1950 (50 U. S. C. 781) deprived the petitioner of the opportunity for a fair and impartial trial. The findings in the latter statute have already been described.[81] The former finds that the Communist Party

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[79]See 64 Harv. L. R. 1013 (1951): "There would seem to be no sound reason why a defendant in a criminal trial should not have access to all the relevant materials which the Government has in its possession except, perhaps, where such discovery may compel the Government to reveal valuable sources of information. Certainly, as measured by the consequences, the need for discovery here may be greater than in civil cases. In balancing the opposing interests, the importance of a fair trial requires that this aspect of the adversary element in a criminal case be reduced to a minimum."

[80]In *United States* v. *Lebron*, 222 F. 2d 531, the Court of Appeals for the Second Circuit upheld the trial court's refusal to allow the defendant to examine a witness' prior statements, after he had read them and found nothing inconsistent. But it was required that the statements be sealed and made a permanent part of the record, so that the appellate court could itself determine whether there were any inconsistencies.

[81]*Supra*, p. 29.

"is in fact an instrumentality of a conspiracy to overthrow the government of the United States" and is dedicated "to the proposition that the present constitutional government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence".

The indictment here charges and the Government offered proof that the Communist Party advocates the violent overthrow of the government. On this issue of fact, the defendant was entitled to a fair trial, before a jury able to reach an independent, objective and impartial verdict on the evidence. *Cf. Moore* v. *Dempsey*, 261 U. S. 86; *Frank* v. *Mangum*, 237 U. S. 309; *Manley* v. *Georgia*, 279 U. S. 1. For the jury here to find that the Communist Party does not advocate the violent overthrow of the government, it would have had to flout the Congressional finding.

In the face of this Congressional finding, it was impossible for the jury to determine the question of violent overthrow on the basis of an independent, objective and impartial viewing of the evidence. *Cf. Delaney* v. *United States*, 199 F. 2d 107.

CONCLUSION

The statute under which Scales has been convicted is in conflict with the overall pattern of legislation in the field of national security, as Congress soon realized when it was shaping the Internal Security Act of 1950. Whether or not the registration provisions of that Act are either wise or constitutional is not here at issue. Wise or unwise, they embody the deliberate purpose of Congress. Manifestly, that purpose would be most effectively frustrated by the constitutional consequences of enforcing the membership clause against Communists. This danger was clearly perceived in Congress, and steps were taken to

ward it off by language added to the Act for that specific purpose. It is remarkable that the Government should have embarked on prosecutions such as this one, so patently at war with Congressional purpose and so dangerous to the effective administration of the Internal Security Act.

The membership clause itself does not embody the considered judgment of Congress, but merely a hasty copying from state statutes enacted in a period not notable for calm or reflective judgment. As Justice Brandeis remarked,[82] the statute undertakes to punish "association with those who propose to preach" a doctrine. As a concept of criminal liability this is novel, noxious, and unnecessary, and this Court should give it no countenance.

It is respectfully submitted that the judgment of the court below should be reversed.

August 24, 1956

TELFORD TAYLOR
Counsel for Petitioner
400 Madison Avenue
New York 17, N. Y.

[82] *Whitney* v. *California*, 274 U. S. 357, 373.

APPENDIX

1. Constitution of the United States:

(a) Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

(b) Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Statutes

18 U. S. C. Section 2385 (the Smith Act):

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.

50 U. S. C. Section 783 (the Internal Security Act of 1950):

(a) It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship, as defined in paragraph (15) of section 782 of this title, the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however,* That this subsection shall not apply to the proposal of a constitutional amendment.

* * *

(c) It shall be unlawful for any agent or representative of any foreign government, or any officer or member of any Communist organization as defined in paragraph (5) of section 782 of this title, knowingly to obtain or receive, or attempt to obtain or receive, directly or indirectly, from any officer or employee of the United States or of any department or agency thereof or of any corporation the stock of which is owned in whole or in major part by the United States or any department or agency thereof, any information of a kind which shall have been classified by the President (or by the head of any such department, agency, or corporation with the approval of the President) as affecting the security of the United States, unless special authorization for such communication shall first have been obtained from the head of the department, agency, or corporation having custody of or control over such information.

* * *

(f) Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. The fact of the registration of any person under section 787 or section 788 of this title as an officer or member of any Communist organization shall not be received in evidence against such person in any prosecution for any alleged violation of subsection (a) or subsection (c) of this section or for any alleged violation of any other criminal statute.

50 U. S. C. Sections 841 and 843 (the Communist Control Act of 1954):

Section 841. The Congress finds and declares that the Communist Party of the United States, although

purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchial chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the

United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed.

Section 843. (a) Whoever knowingly and willfully become or remains a member of (1) the Communist Party, or (2) any other organization having for one of its purposes, or objectives the establishment, control conduct, seizure, or overthrow of the Government of the United States, or the government of any State or political subdivision thereof, by the use of force or violence, with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the Internal Security Act of 1950, as amended, as a member of a "Communist-action" organization.

(b) For the purposes of this section, the term "Communist Party" means the organization now known as the Communist Party of the United States of America, the Communist Party of any State or subdivision thereof, and any unit or subdivision of any such organization, whether or not any change is hereafter made in the name thereof.

28 U. S. C. Section 1861 (Qualifications of jurors):

Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

(2) He is unable to read, write, speak and understand the English language.

(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service.

(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held.*

28 U. S. C. Section 1864 (Manner of drawing names of grand and petit jurors):

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.

* * *

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines.

* * *

*Section 9.1 of the General Statutes of North Carolina states that a juror must be a person who resides in the county, who is over 21 years of age and who is "of good moral character" and has "sufficient intelligence to serve as a member of grand and petit jurors". The statute excludes from jury service all those "who have been convicted of any crime involving moral turpitude or who have been adjudged to be *non compos mentis*".